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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORTS

TRACTORS MALAYSIA BHD. v. TIO CHEE HING

[P.C. (Lord Diplock, Lord Cross of Chelsea, Lord Kilbrandon and Lord Salmon) April 10, 1975]
[Privy Council Appeal No. 23 of 1973]

Practice and Procedure — Application to set aside consent judgment — Fresh action — Whether action frivolous or vexatious — R.S.C. 1957, O. 25 r. 4.

This was an appeal from the decision of the Federal Court ([1973] 1 M.L.J. 66). The appellants had obtained a consent judgment against the respondent. The respondent applied in the same action to have the judgment set aside but the application was dismissed. Subsequently the respondent brought an action to set aside the consent judgment in the former action. The learned trial judge set aside the proceedings on the ground that the action was frivolous and vexatious and brought to defeat the course of justice in the hope of delaying the execution of the judgment. On appeal to the Federal Court, it was held that the respondent's statement of claim raised triable issues which were *prima facie* sustainable. The Federal Court regarded themselves as precluded from examining the evidence for the purpose of determining whether it was a clear inference from the facts in evidence which were undisputed, that the action was bound to fail. They therefore allowed the appeal so that the action should be allowed to proceed to trial. The appellants appealed.

Held: the Federal Court was in error in refusing to submit the evidence to critical examination. If they had done so they would have come to the same conclusion as the High Court judge that the action was brought to defeat the course of justice in the hope of delaying the execution of the judgment in the earlier action.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Samuel Stamler Q.C. and *Nicholas Strauss* for the appellant.

J. G. Le Quesne Q.C. and *Stuart McKinnon* for the respondent.

Lord Diplock (delivering the judgment of the Board): This is an appeal from an interlocutory order of the Federal Court of Malaysia. The question that it raises is whether an action (herein called "the New Action") brought by the respondent against the appellant in the High Court in Borneo by a Writ and Statement of Claim dated May 16, 1972 ought to be summarily dismissed as frivolous and vexatious. The principal relief sought in the New Action was to set aside a judgment entered against the respondent on December 27, 1969 in a previous action (herein called "the Old Action") between the same parties for the sum of $718,266.85, due under an agreement of November 21, 1968. The appellant's application to set aside the Writ and all subsequent proceedings in the New Action was based on the inherent jurisdiction of the court to prevent abuse of its process. Affidavit evidence was adduced by each party. Upon consideration of this evidence the High Court (Lee Hun Hoe J.) was satisfied that the New Action was frivolous and vexatious and brought "to defeat the course of justice in the hope of delaying the execution of a judgment", *sc.* in the Old Action. He, accordingly, set aside the proceedings.

Upon appeal from the High Court in Borneo, the Federal Court of Malaysia appear to have treated the appellant's application as if it had been made only under Order XXV Rule 4, and not under the inherent jurisdiction of the court. They considered that the Statement of Claim raised triable issues and regarded themselves as precluded from examining the evidence for the purpose of determining whether it was an ineluctable inference from facts in evidence which were undisputed, that the New Action was bound to fail.

The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the Statement of Claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the Statement of Claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

It all starts with a transaction between the appellant and the respondent which took place in November 1968. The respondent was a landowner and property developer in Sabah. At that time he had embarked upon a project for developing a new satellite town upon land that he owned in Lahad Datu. He was also the managing director of a company Southern Estate Sendirian Berhad ("Southern Estate") of which he and his wife were the sole shareholders. Southern Estate had hired from the appellant nineteen tractors in respect of which it was indebted to the appellant for amounts exceeding $2m. On November 21, 1968, the respondent entered into a written agreement with the

appellant ("the Agreement") whereby in consideration of the appellant's refraining from taking legal proceedings to recover these sums from Southern Estate, the respondent undertook and guaranteed as principal debtor the payment to the appellant on demand of the total amounts owing by Southern Estate. By Clause 2 of the Agreement no demand was to be made on the respondent for full payment of the debt so long as he complied with certain conditions. For the purposes of this appeal it is only necessary to refer to two of them. By Clause 2 (3) he was required upon request by the appellant to execute a charge over all lands owned by him except the lands comprised in his New Town project in Lahad Datu; and by Clause 2 (5) he was required to pay towards discharge of the debt, the monthly sum of $50,000 beginning on March 15, 1969.

By his Statement of Claim in the New Action he alleges that he was not literate in English and that he was induced to sign the Agreement by the representation of the appellant's solicitor who drafted the Agreement that it contained a term that the respondent's lands comprised in his New Town project in Lahad Datu would in no circumstances be utilized in repaying Southern Estate's debts. A representation in these terms would be equivocal in view of the respondent's assumption of the role of principal debtor; but their Lordships for present purposes, despite its inherent improbability, will treat the allegation as being that the representation was intended by the solicitor and understood by the respondent to mean not only that those lands were not to be liable to be charged under Clause 2 (3) but also that they were to be exempt from any proceedings by way of execution of any judgment recovered by the appellant against the respondent in an action for monies payable by him under the Agreement. On this assumption as to meaning of the respondent's allegation the representation must have been fraudulent as well as false for the solicitor must have known that the Agreement that he had drafted did not contain so extraordinary a term. So in substance what is alleged in the Statement of Claim in the New Action is that the Agreement sued upon by the appellant in the Old Action, in which judgment for $718,266.85 was recovered, was voidable for fraud.

Needless to say the solicitor in his affidavit denies that he made any such representation. This and matters peripheral to it, such as the extent of the respondent's knowledge of the English language and whether he read the Agreement over before signing it, are the only relevant facts upon which there is conflicting evidence. Before turning to subsequent events, as to which the evidence is undisputed, their Lordships would observe that neither in his Statement of Claim nor in any of his affidavits does the respondent allege that he continued to be unaware of the true contents of the Agreement after the close of the meeting at which he signed it.

There were a number of events which must have given him occasion to consult the Agreement. The first occurred on May 1, 1969 when, having defaulted on the instalments payable under Clause 2 (5), he was required under Clause 2 (3) to execute charges over seven parcels of land which were not included in his New Town project.

His default on payment of the instalments continued; and on October 28, 1969 the appellant issued the writ in the Old Action. It was specially endorsed; it recited the Agreement and claimed a sum of some $2m. as being due under it. An appearance was entered on his behalf by advocates instructed by the respondent; and following upon discussion as to the amount due after allowing for repayments and rebates, a Defence was filed on December 1, 1969 admitting liability for $718,266.85. On December 27, 1969 a summons for leave to enter judgment for this sum was heard. It was attended by the respondent's advocate who consented to judgment being entered accordingly.

The advocate has sworn that the respondent did not consult him about the Agreement but merely instructed him to submit to judgment. Their Lordships are prepared to assume, again despite its inherent improbability, that the respondent was not aware that the judgment would render the lands comprised in his New Town project liable to be taken in the ordinary course of execution. But his unawareness can only have been of brief duration; for on January 26, 1970 the appellant obtained a prohibitory order in respect of four parcels of land which were comprised in the New Town project. The respondent instructed his advocate not to oppose this application. If the respondent's story as to the representation made to him when he signed the Agreement were true the application would have been a flagrant breach of what he understood to be the terms of the Agreement. In their Lordships' view it offends credulity that he should have instructed his advocate not to oppose the prohibitory orders if the case he now seeks to make in the New Action had any foundation in fact.

The matter, however, does not stop there. On August 28, 1971 a further unopposed prohibitory order was obtained in respect of another and more valuable parcel of land comprised in the New Town project which had previously been encumbered by prior charges that the respondent had been able to redeem. This was followed on September 18, 1971 by an order for sale of the land by auction. The date fixed for the auction was postponed a number of times at the respondent's request in order to enable him to raise funds to satisfy the judgment. At no time did he make any suggestion that the land, although comprised in his New Town project, was not liable to be taken in execution to satisfy the judgment. On the contrary another firm of advocates, in an endeavour to obtain a further postponement of the auction date, informed the appellants of the respondent's intention to sell by tender four other parcels of land comprised in his New Town project. Another postponement of the auction date was obtained on January 6, 1972. It was granted on the application of the respondent's advocates. Again there was no suggestion that the land was not liable to be taken in execution; the only ground put forward was to enable the respondent to raise funds.

The extended time having expired, the next thing that happened was that the respondent took out a summons in the Old Action applying that the judgment should be set aside and that he should be given unconditional leave to defend. It is common ground that as a matter of procedure this was misconceived, but

the affidavit filed by the respondent in support of it is relevant to the question whether the New Action is frivolous and vexatious. For the first time, more than three years after the event, he alleged that in the course of the discussions prior to the execution of the Agreement he had made it clear that his lands comprised in the New Town project should on no account be utilized in any way to discharge Southern Estate debts to the appellant and that the appellant's representative agreed to this. There is no suggestion that there had been any misrepresentation about the terms of the Agreement as reduced into writing, or that he signed the Agreement without reading it or was unaware that the only provision in it which related to the lands comprised in his New Town project was that which exempted them from the requirement in Clause 2 (3) that he should at the request of the appellant execute a charge upon his lands. On the contrary he relied upon that provision (erroneously referred to as Clause 3) in support of his account of the oral discussions which preceded the execution of the Agreement — not as departing from what had previously been orally agreed. This affidavit was avowedly made after he had consulted fresh solicitors. The only ground on which he sought to rely for setting aside the judgment was that the consideration for the Agreement (*viz.* forbearance to sue Southern Estate) had wholly failed.

This summons was dismissed on March 13, 1972; but before the postponed auction could be held, the respondent started the New Action. The undisputed facts relating to events occurring during the period between the execution of the Agreement of November 21, 1968 and the commencement of the New Action on May 16, 1972, which their Lordships have recited, in their view make it clear beyond a peradventure that the respondent's case of fraudulent misrepresentation inducing the Agreement is bound to fail. They agree with the High Court judge that the New Action "is nothing but merely a new twist to overcome [the respondent's] difficulty in raising the loan and to delay the execution of judgment against him". Their Lordships do not doubt that the Federal Court, but for the fact that it mistakenly considered that it was precluded from examining the evidence, would have come to the same conclusion. They note with regret that even if the New Action be now summarily dismissed it will have succeeded in delaying execution of the judgment in the Old Action for nearly three years — which may be longer than the period which would have been taken by its going to trial.

Their Lordships will advise His Majesty the Yang Dipertuan Agung that the appeal should be allowed and the Order of the High Court in Borneo restored and that the respondent should pay the appellant's costs here and below.

Appeal allowed.

Solicitors: *Slaughter & May; Coward Chance.*

CHOP SENG HENG v. THEVANNASAN & ORS.

[P.C. (Lord Wilberforce, Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton and Sir Thaddeus McCarthy) May 21, 1975]
[Privy Council Appeal No. 24 of 1973]

Negligence — Lorry parked on correct side of highway with lights on — Another lorry crashing into stationary lorry from behind — Responsibility for accident — Apportionment of liability.

This case arose out of an accident which occurred when a lorry owned by the appellants and driven by their employee crashed into the rear of a stationary lorry owned by the second respondents which was in charge of their employee, the first respondent. The third respondent was a passenger in the appellant's lorry, being employed by them as an attendant. He sustained serious injuries as a result of the collision and sued the owners of both the vehicles and their respective drivers. In the High Court Suffian F.J. (as he then was) held that both drivers were to blame and he apportioned the liability of the first and second respondents at 75% and that of the appellant and their driver at 25%. On appeal to the Federal Court by the first and second respondents and a cross-appeal by the appellant, the majority (Ong C.J. dissenting) exculpated the first and second respondents and held the appellants solely liable ([1973] 1 M.L.J. 254). The appellants appealed to the Privy Council.

Held, allowing the appeal: (1) in this case all the members of the Federal Court had accepted the trial judge's finding that the first respondent had parked his car too close to the corner. This finding when considered in conjunction with the time of the accident and the weather conditions then prevailing, made it clear that the first and second respondents were rightly blamed in part for the accident;

(2) in the circumstances of this case the trial judge was entitled to hold that not only was the driver of the stationary lorry to blame for parking as he did, but that the driver of the oncoming lorry contributed to the plaintiff's injuries by the speed at which he was travelling when he struck the second respondents' lorry;

(3) as there was no misdirection by the trial judge in this case and no error in principle had been established, the 75:25 apportionment arrived at by the trial judge would be restored.

Cases referred to:-

(1) *Bolton & Ors.* v. *Stone* [1951] 1 All E.R. 1078.
(2) *Kelly* v. *W.R.N. Contracting Ltd. & Anor.* [1968] 1 All E.R. 369 at p. 370; [1968] 1 W.L.R. 921.
(3) *Coote* v. *Stone* [1971] 1 W.L.R. 279.
(4) *Chan Loo Khee* v. *Lai Siew San & Ors.* [1971] 1 M.L.J. 253.
(5) *Tidy* v. *Battman* [1934] 1 K.B. 319 at p. 322.
(6) *Waller* v. *Levoi* (1968) 112 S.J. 865.
(7) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372.
(8) *The Macgregor* [1943] A.C. 197.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Lord Gifford for the appellants.

Eugene Cotran, Barney Desai and *Nigel Murray* for the respondents.

Lord Edmund-Davies (delivering the judgment of the Board): This is an appeal from the judgment of the Federal Court of Malaysia allowing the appeal of the first and second defendants and dismissing the fourth defendants' cross-appeal from a judgment of the High Court in Malaya. The proceedings arose out of a road accident which occurred when a lorry owned by the fourth defendants and driven by the third defendant, their employee, crashed into the rear of a stationary lorry owned by the second defendants which was in the charge of their employee, the first defendant.